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October 17, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP343-CRNM State of Wisconsin v. Alexander Luckett (L.C. #2009CF5072)

Before Curley, P.J., Kessler and Brennan, JJ.

Alexander Luckett appeals from a judgment of conviction, entered upon a jury's verdict, on two counts of third-degree sexual assault. Appellate counsel, Steven P. Cotter, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Luckett was advised of his right to file a response, and he has responded. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Luckett's response, we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On October 9, 2007, Luckett went to the home of his ex-girlfriend, Chinyere M., to drop off some clothes of hers that he still had, along with a birthday card for her daughter. While Luckett was at her home, he performed cunnilingus on her and had penis-to-vagina intercourse with her while on her couch. Chinyere M. claimed that she did not consent to either act and repeatedly told Luckett to stop, and that he held her down on the couch when she attempted to get up. Luckett claimed the encounters were consensual.

The case was originally charged as a single misdemeanor count of fourth-degree sexual assault. For reasons that will be discussed herein, the misdemeanor case was dismissed and recharged as two counts of third-degree sexual assault. The new case was tried to a jury, which convicted Luckett. The circuit court sentenced him to three years' initial confinement and two years' extended supervision for each count, to be served concurrently, imposed and stayed in favor of three years' probation.

Appellate counsel has identified two potential issues for appeal: whether there is any arguable merit to a claim that the circuit court erroneously exercised its discretion in disallowing Attorney Jessica Stroebel's attempts to withdraw from representing Luckett, and whether there is any arguable merit to a claim of prosecutorial vindictiveness. Luckett, despite a lengthy

response,[2] really only raises three potential issues: prosecutorial vindictiveness, challenges that we characterize as a jurisdictional challenge stemming from the prior misdemeanor's dismissal, and judicial bias. Independently, we identify and discuss two other potential issues: sufficiency of the evidence to support the verdict and the circuit court's exercise of sentencing discretion.

I. *Counsel's Motions to Withdraw*

Prior to Attorney Jessica Stroebel's appointment, four other attorneys represented Luckett. Two of them withdrew because of an inability to work with Luckett.[3] When Stroebel, the fifth attorney, became the third to seek withdrawal, the circuit court denied her request.[4]

[2] Of Luckett's thirty-nine page response, the first nineteen discuss events in the misdemeanor case. However, except to the extent discussed herein, the misdemeanor case is largely irrelevant and is not before us on appeal. Indeed, because the misdemeanor case was dismissed, Luckett would be unable to bring an appeal in the matter.

Moreover, Luckett's response appears to be rather fantastical. He "recalls" multiple statements that he insists he made or heard, even though the statements are not found in any transcripts. He thus asserts that the transcripts are inaccurate and falsified by the court reporters, part of a scheme to protect the court officials and lawyers involved in his cases. In some instances, Luckett completely misrepresents events, though it is not clear whether such misrepresentation is intentional or simply based on a fundamental misunderstanding of procedure.

Thus, to the extent that Luckett has raised or attempted to raise an issue in his no-merit response that we do not expressly address, it is deemed rejected as lacking arguable merit. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996). Additionally, to the extent that Luckett asks, via letter, for corrections to the transcripts to make them comport with his recollections of events, the request is denied.

[3] It appears that the first attorney, as is often the case, represented Luckett at the initial appearance until Luckett could be referred to the public defender for appointed counsel. A later attorney had to withdraw for reasons related to suspension or loss of his professional license.

[4] In this case, Luckett appeared before Court Commissioners Grace Flynn and Barry Slagle, the Honorable Rebecca F. Dallet, the Honorable Dennis Cimpl, and, briefly, the Honorable Thomas P. Donegan. Unless otherwise indicated, however, our use of "the circuit court" will refer to Judge Cimpl's court.

"Whether trial counsel should be relieved and a new attorney appointed is a matter within the circuit court's discretion." ***State v. Jones***, 2010 WI 72, ¶23, 326 Wis. 2d 380, 797 N.W.2d 378. A reviewing court considers a number of factors, including the adequacy of the circuit court's inquiry into the defendant's complaint, the timeliness of the motion, and whether the alleged conflict between counsel and client was "so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." *See* ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). However, if a defendant repeatedly makes requests for new counsel without any evidence of the present attorney's incompetency or conflict, the circuit court "may summarily conclude without a full inquiry that the request is merely a ploy to disrupt the trial process." *See* ***id.*** at 361.

Attorney Stroebel first appeared for Luckett on July 20, 2010. By August 5, 2010, she had moved to withdraw, citing a "breakdown in communication" and indicating that Luckett "informed me that he would like new counsel." At the motion hearing, Luckett explained that he could not work with her because "she spent 35 minutes lying in a conversation."[5] The circuit court, suspecting that the reality was that Stroebel had simply told Luckett things he did not want to hear, denied the motion, noting "this is not the first time you [Luckett] have pulled this."

Stroebel attempted to withdraw again by motion filed September 16, 2010, advising the circuit court that Luckett was not returning her phone calls. Luckett again insisted that Stroebel had been lying to him. The circuit court again denied the motion, and advised Luckett to start

[5] Luckett also requested that he be allowed to present the case for Stroebel's withdrawal with the media in the courtroom. The circuit court explained that it did not have the authority to order the media into the courtroom.

cooperating with his attorney. At a final pretrial on October 8, 2010, Stroebel renewed her motion to withdraw, at which point the circuit court explained, "[H]e's had three lawyers who were allowed to withdraw … and I'm convinced that he's not going to get along with any lawyer."

On November 1, 2010, the circuit court explained to Luckett that the public defender was not going to appoint another attorney for him, and warned Luckett that if Stroebel withdrew, he would have to proceed *pro se*. The circuit court also specifically concluded "that his conduct in not cooperating with any of the lawyers … frustrates the orderly and efficient progression of this case and I think he is trying to do that intentionally." On November 17, 2010, the first day of trial, Stroebel renewed her motion and the circuit court again denied it. It explained that it believed Luckett was not competent to represent himself and that "it wouldn't make a difference which attorney was sitting next to Mr. Luckett, he would not cooperate with that attorney[.]"

Here, the circuit court clearly concluded that any conflict with Stroebel was manufactured by Luckett as a dilatory tactic. *See* ***id.***; *see also* ***State v. Cummings***, 199 Wis. 2d 721, 750, 546 N.W.2d 406 (1996). If anything, the circuit court's refusal to discharge Stroebel likely preserved Luckett's constitutional right to the assistance of counsel. *See* ***Cummings***, 199 Wis. 2d at 747-48. Thus, based on the record as a whole, we conclude there is no arguable merit to a claim the circuit court erroneously exercised its discretion in denying Stroebel's multiple motions to withdraw.

II. *Prosecutorial Vindictiveness*

Appellate counsel had the current record supplemented with the record from the original misdemeanor case. Thus, we know that Luckett was originally charged with one count of fourth-

degree sexual assault, a misdemeanor.[6] Luckett pled guilty to that offense but moved to withdraw his plea before sentencing. The misdemeanor court ultimately granted the motion for reasons other than those on which Luckett sought withdrawal. Subsequently, the State, indicating it did not plan to continue the case as a misdemeanor, asked to have the charge dismissed without prejudice.[7] The circuit court granted the request.[8] The case was then assigned to a new assistant district attorney, who charged the current two counts of third-degree sexual assault, both felonies.[9] The potential issue that both counsel and Luckett raise here is whether there was prosecutorial vindictiveness in charging the greater offenses following Luckett's successful plea withdrawal.

"[A] prosecutor has great discretion in charging decisions and is generally answerable for those decisions to the people of the state and not the courts." ***State v. Johnson***, 2000 WI 12, ¶16, 232 Wis. 2d 679, 605 N.W.2d 846. "To establish a claim of prosecutorial vindictiveness, a defendant must show either a 'realistic likelihood of vindictiveness,' therefore raising a rebuttable presumption of vindictiveness, or actual vindictiveness." ***State v. Williams***, 2004 WI App 56, ¶43, 270 Wis. 2d 761, 677 N.W.2d 691 (quoting ***Johnson***, 232 Wis. 2d 679, ¶17). "[A] presumption of vindictiveness attaches to a prosecutor who increases charges when … the state

[6] "[W]hoever has sexual contact with a person without the consent of that person is guilty of" fourth-degree sexual assault. WIS. STAT. § 940.225(3m).

[7] At the status hearing where the State dismissed the charge, Luckett appeared without counsel. The State informed the circuit court that one reason it wanted to dismiss was to avoid clogging the circuit court's calendar with additional status hearings.

[8] Both the plea withdrawal and the dismissal in the misdemeanor case were granted by the Honorable John A. Franke.

[9] "[W]hoever has sexual intercourse with a person without the consent of that person is guilty of" third-degree sexual assault. WIS. STAT. § 940.225(3).

is pursuing a second conviction for the same course of conduct following a defendant's successful appeal." ***State v. Edwardsen***, 146 Wis. 2d 198, 203, 430 N.W.2d 604 (Ct. App. 1988); *see also* ***United States v. Goodwin***, 457 U.S. 368, 376 (1982).

Appellate counsel concludes that there is no arguable merit to a claim of prosecutorial vindictiveness because, though the original case charged Luckett with a misdemeanor, that was a "negotiated issuance." That is, the prosecutor originally concluded she could charge second-degree sexual assault, but agreed to file a complaint charging only fourth-degree sexual assault in exchange for Luckett's guilty plea to the misdemeanor.[10] A second-degree sexual assault charge is a Class C felony, punishable by up to forty years' imprisonment, but a third-degree charge is a Class G felony, punishable by up to ten years' imprisonment. *See* WIS. STAT. §§ 940.225(2)-(3) & 939.50(3)(c), (g). Thus, appellate counsel reasons that because the original potential charge's maximum penalty was greater than the maximum penalty for the two new Class G felonies combined, there is no merit to a claim of prosecutorial vindictiveness because there is not really an increased charge.

We agree that, to the extent the State may have threatened higher charges if Luckett declined to plead guilty to fourth-degree sexual assault, there would be no arguable merit to a claim of prosecutorial vindictiveness. *See* ***Bordenkircher v. Hayes***, 434 U.S. 357, 365 (1977) (not a due process violation for prosecutor to follow through with threat, used in plea negotiation, to charge more serious offense). The record, however, does not conclusively demonstrate that this was the case.

[10] This would have prevented the case from being assigned a felony case number.

However, even if we must apply the ***Edwardsen*** presumption of vindictiveness, the presumption can be rebutted "with an explanation of the objective circumstances" that led to the new, higher charges. *See* ***Johnson***, 232 Wis. 2d 679, ¶45. Here, the record in the felony matter indicates that although the fourth-degree charge was dismissed because the prosecutor at that time thought she might be unable to prove the case beyond a reasonable doubt, her successor explained in an offer letter filed in this case that the victim had been in to see him, he had thus reviewed the file, and, based on his review of events, he believed he could proceed on two counts of third-degree sexual assault.[11] Based on our review of the record, this sufficiently overcomes the presumption of vindictiveness. *See* ***Williams***, 270 Wis. 2d 761, ¶47 (different approach by new prosecutor adequately rebuts presumption of vindictiveness).

With the presumption rebutted, a showing of actual vindictiveness is required, but the record simply does not support such a claim. There is, therefore, no arguable merit to a claim of prosecutorial vindictiveness.[12]

III. *"Jurisdictional" Issues*

Luckett also raises what appear to be either jurisdictional or competency challenges. For one thing, he notes that the summons under which he appeared in the felony case had the misdemeanor case number on it. It is apparent from the record, however, that using the

[11] The record of the hearing at which the fourth-degree charge was dismissed does not indicate that the prosecutor thought there was a proof problem. However, the subsequent offer letter from the new prosecutor listed that as a reason for dismissal.

[12] We have considered whether there might be an arguably meritorious claim of double jeopardy of some sort. However, a double jeopardy claim is waived by plea withdrawal. *See* ***State v. Schmear***, 28 Wis. 2d 126, 135, 135 N.W.2d 842 (1965).

misdemeanor case number on the summons was simply clerical error. Indeed, Luckett acknowledges that before the initial appearance in the case, his attorney changed the number on the summons to reflect the felony case number.

Luckett also contends that "[a]fter discovering … that neither the felony second degree sexual assault and the fourth degree misdemeanor information was not filed in a timely manner the case should have been dismissed…. If the charges were filed as the transcripts from the proceedings is falsely stating[, t]hen immediately, upon withdrawal of my guilty plea the case should have proceeded to a trial." Luckett has insisted, at multiple points in this case, that he was never charged with fourth-degree sexual assault, a belief that appears to stem from his concern that no information was ever filed in the misdemeanor case.

As noted, the misdemeanor case is not directly before us on appeal. To the extent, however, that Luckett somehow would have these "jurisdictional" infirmities carried over into this case, he is woefully ill-informed.

First, second-degree sexual assault was not actually charged, so none of the charging documents would have reflected that offense.[13] Second, it is true that an information must be filed within thirty days of the completion of a preliminary examination. *See* WIS. STAT. § 971.01(2). However, that requirement *does not apply* in misdemeanor actions because a preliminary examination is not required in misdemeanor cases. *See* WIS. STAT. § 970.03(1) (preliminary hearing used to determine whether there is probable cause that defendant committed

[13] We note that when it allowed Luckett to withdraw his guilty plea, one of the misdemeanor court's criticisms was the sparse record of the "negotiated issuance" as a term of the plea bargain.

a felony). That is, no filing of an information was required in Luckett's misdemeanor case. Third, the case would not have "immediately … proceeded to trial" upon Luckett's plea withdrawal. It certainly could have, but the State could have sought a continuance, attempted to negotiate a new bargain, or proceeded as it did by dismissing the charge and starting over. There is no arguable merit to a challenge to the circuit court's jurisdiction or competency in this case.

IV. *Judicial Bias*

We next consider whether there is any arguable merit to a claim that the circuit court displayed judicial bias. Luckett contends that Judge Cimpl "should have removed himself from my case after showing prejudice towards me by not only attempting to protect [the assistant district attorney] but, also to protect the conduct of [Attorney] Stroebel and the other attorney's [sic] that were involved in this case."

WISCONSIN STAT. § 757.19 governs disqualification of judges. Paragraphs (2)(a)-(f) are objective factors, none of which apply here to require disqualification. *See* ***State v. American TV and Appliance of Madison***, 151 Wis. 2d 175, 181-82, 443 N.W.2d 662 (1989). Paragraph (2)(g) reflects the judge's subjective opinion and requires recusal only if the judge thinks he or she cannot, or it appears he or she cannot, be impartial. Further, there is a rebuttable presumption that a judge acted fairly and impartially in discharging his or her duties. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114.

The circuit court here noted that Luckett "does not feel that he will get a fair trial with me presiding over this case, [but] I decline to recuse myself. I am trying to get this case moving. I have nothing against Mr. Luckett." That is, the circuit court determined that its disqualification was not required. The record does not reveal anything to undermine that conclusion, and

Luckett's conclusory claim that the circuit court was protecting attorneys does not change that determination. We note, however, that to the extent that Luckett may believe the circuit court displayed judicial bias through its adverse rulings, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." ***Liteky v. United States***, 510 U.S. 540, 555 (1994).

V. *Sufficiency of the Evidence*

On our own, we raise and discuss whether there is any arguable merit to a claim that there was insufficient evidence to support the jury's verdict. We view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). "'[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted).

The jury is the sole arbiter of witness credibility, and it alone is charged with the duty of weighing the evidence. ***Poellinger***, 153 Wis. 2d at 506. We defer to the jury's function of weighing and sifting conflicting testimony in part because of the jury's ability to give weight to nonverbal attributes of the witnesses. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989).

To prove third-degree sexual assault, the State had to show that Luckett had sexual intercourse with Chinyere M. and that he did so without her consent. The two acts of intercourse—mouth to vagina and penis to vagina—were undisputed and, thus, the sole question the jury had to resolve was whether Chinyere M. consented to them. The answer to that question

hinged on the jury's credibility determination: Chinyere M. testified that she told Luckett at the start of their conversation that she was not interested in having sex with him, that she repeatedly told him to stop, and that she attempted to get up from the couch but could not because of how Luckett had positioned himself in front of her. Luckett testified that Chinyere M. never objected.[14] Clearly, the jury accepted Chinyere M.'s version of events, and that testimony is sufficient to sustain the verdict.

VI. *Sentencing Discretion*

The other issue we raise independently is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a circuit court must consider the principle objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

[14] The State also impeached Luckett's testimony with his testimony from a case in which Chinyere M. was seeking a restraining order after the assault because Luckett would not stop calling her. At the hearing, Luckett told the court commissioner, "Yeah, like I know what I was doing. While I was doing that, she kept saying, I didn't want -- I don't want to go there with you for spiritual reasons."

Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors. The maximum possible sentence Luckett could have received was twenty years' imprisonment. The sentence totaling five years' imprisonment, imposed and stayed in favor of three years' probation, is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguable merit to a claim the circuit court erroneously exercised its discretion in setting the sentence length.

The circuit court additionally ordered Luckett to pay approximately $4032 in restitution to Chinyere M. after a hearing. Restitution is "an 'equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been, had the [event] not occurred.'" ***State v. Dugan***, 193 Wis. 2d 610, 621, 534 N.W.2d 897 (Ct. App. 1995) (citation omitted). Restitution awards in criminal cases are authorized and governed by WIS. STAT. § 973.20. "The restitution statute … reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution." ***Dugan***, 193 Wis. 2d at 622. The primary purpose of restitution is not to punish the defendant, but to compensate the victim. ***Id.*** at 623-24. In determining whether to order restitution and the amount to be paid, the circuit court is to consider the amount of the victim's loss, the defendant's financial resources, the defendant's present and future earning ability, the needs and earning ability of the defendant's dependents, and any other factors the circuit court deems appropriate. *See* WIS. STAT. § 973.20(13)(a). We review a restitution order for an erroneous exercise of discretion. *See* ***State v. Haase***, 2006 WI App 86, ¶5, 293 Wis. 2d 322, 716 N.W.2d 526.

We conclude that the circuit court properly exercised its discretion in ordering restitution. It excluded from the award certain emergency room expenses, concluding that they were too attenuated from the crime. It noted that a $2500 cash bond was available to be applied towards the award. As a condition of probation, Luckett was ordered to seek and maintain full-time employment or schooling, giving Luckett a strong likelihood of ability to pay, and the circuit court noted that Luckett would have the duration of his probation to pay the remaining amount of the award before it converted to a civil judgment. There is no arguable merit to a challenge to the restitution order.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven P. Cotter is relieved of further representation of Luckett in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals